SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1196

STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS AND WILLIAM L. FERGUSON, *Petitioners*

v.

UNITED PARCEL SERVICE, *Respondent*

To the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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No.

STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS AND WILLIAM L. FERGUSON, *Petitioners*

v.

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To the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The decision and order of the Petitioner Commission (App. A, *infra*) are unofficially reported 4 EPD ¶ 5047 (1972) [CCH Publication, "Employment Practices Decisions," cited herein as "EPD"].

The opinion and order of the Circuit Court for Prince George's County, Maryland (App. C, *infra*) are unofficially reported at 6 EPD 5001 (1973). The decision of the Court of Appeals of Maryland (App. D, *infra*) is reported at 270 Md. 202, 311 A. 2d 220, 6 EPD ¶ 8926 (1973).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on November 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether a state court may constitutionally fashion a strict state procedural barrier which denies to an individual charging racial discrimination in employment the right to obtain relief from a systemic employment practice despite an undisturbed finding by a state civil rights agency that the challenged practice is racially discriminatory under this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions involved are the Maryland Fair Employment Practices Act, Art. 49B, Md. Code Ann. § 17 *et seq.* (1957, 1973 Supp.) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1970), as amended by the Equal Opportunity Act of 1972, 86 Stat 103 (1972). They are set forth in App. F and G *infra.*

The constitutional provisions involved are the Supremacy Clause, Article VI, Cl. 2, and the Fourteenth Amendment, Sec. 1, to the United States Constitution. They are set forth in App. H, *infra.*

STATEMENT

William L. Ferguson (Ferguson), an unemployed 32-year-old black male, filed a complaint on March 30, 1970 with the State of Maryland Commission on Human Relations (Commission) charging the United Parcel Service (UPS) with racial discrimination in hiring (App. B, *infra,* pp. B 2-3). The case proceeded through the statutory administrative process: an investigation was conducted of Ferguson's charges of UPS' hiring practices regarding the job in question, probable cause was found to believe UPS' hiring practices concerning the job were discriminatory, conciliation failed and the case was noticed for hearing (App. B, *infra.* pp. B 1-5).

The notice for public hearing specified that UPS must be prepared to answer charges recited in Ferguson's complaint and the Commission's staff report of its investigation. Both documents were sent to UPS along with the notice of hearing (App. B, *infra.*). The Commission then held two days of hearings on January 24, 1972 and January 31, 1972 when the following record was established:

UPS is a national concern employing 45,000 people. It is engaged in the business of delivering small packages to customers in over forty states. UPS operates a Maryland distribution center (HUB) in Prince George's County. Work at the HUB involves unloading, sorting and reloading over 70,000 packages daily.

One of the positions at the HUB is that of "loader/unloader," a position that involves unloading packages from trailer trucks, placing them on a conveyor belt and reloading the packages onto another truck. The

loader/unloader must possess skill and knowledge sufficient to understand the UPS sorting procedure so that packages handled are loaded on the proper truck. The loader/unloader job is an entry level position at UPS and requires only a good physical condition; no prior experience or special qualifications are necessary.

Since UPS has experienced a 50% turnover rate for the loader/unloader position, it continually has sought candidates for the job. To attract job applicants in 1970, UPS periodically placed newspaper advertisements in *The Washington Post*. The most recent figures revealed that about 4,000 people have applied yearly for this job at the HUB and about one out of every ten applicants was hired.

During 1970, job applicants at the HUB were required to complete an extensive UPS employment questionnaire which has been in use at the HUB since at least 1964. Among the things that applicants were required to disclose on the questionnaire were data concerning their educational achievements, credit background, personal history, employment history and experience, driving record, and arrest and conviction data.

On January 6, 1970, Ferguson applied for the loader/unloader position at HUB in response to a UPS advertisement. On that day he completed the UPS questionnaire which revealed among other things: that he had been arrested and convicted of nonsupport; that he had had six jobs over the previous ten years; that he had been discharged from his last job; that his Maryland driver's license had been suspended and revoked; and that he rented his home and had some financial difficulties.

At the time Ferguson applied for the loader/unloader job a high school degree was required for the position but the requirement was dropped later in 1970. The only UPS employment qualification which related to the job was the applicant's physical and mental capacity to perform, and a UPS official acknowledged that Ferguson possessed these qualities and could perform the job.

Ferguson's application was initially given a rejection rating by a UPS personnel interviewer although Ferguson was not advised of the rejection. The reasons given for Ferguson's rejection were based upon his responses in three areas: Arrest and conviction, work history, and revoked driver's license. A fourth disqualifying element, credit, was given later as justification for not hiring Ferguson. UPS contended the ultimate reason for Ferguson's rejection for the job was his failure to "project" himself as the type of individual who would be a long term employee.

UPS admitted that its employment qualifications were not evenly applied to all applicants. The flexibility accorded each criterion depended on the personnel interviewer's subjective notions about the qualities that would make a man likely to be a long term employee.

After not being contacted and observing another UPS advertisement for loader/unloader, Ferguson again returned to the HUB during February, 1970. Ferguson again applied on March 5, 1970, but was finally told not to come back unless called by UPS.

Over fifty percent of the applicants for the loader/unloader position were black. Despite the high percentage of black applicants, a four month UPS survey revealed that the UPS hiring process had an exclu-

sionary effect upon black applicants since only 36 blacks were hired as loader/unloader while 59 whites were hired for that position. Thus the number of whites hired under the UPS selection process for the loader/unloader position was approximately 1.6 times the number of blacks hired.

The racially exclusionary effect of UPS' hiring practices was also manifested in certain specific UPS employment qualifications:

A. *Arrest and Conviction Questions*

The UPS' application form contained questions concerning an applicant's arrest and conviction record which formed a basis for a decision to hire. The record indicates that with regard to arrests for offenses against the family and incarceration or nonsupport in Maryland and the nation, a disproportionate percentage of blacks over whites are apprehended and convicted.

B. *Credit and Related Financial Questions*

The UPS' application form contained several questions relating to an applicant's credit and general financial stability which also were used to qualify applicants. Dr. Homer Favor, a black employment expert, commented on the exclusionary effect of this factor when used as an employment qualification:

> . . . [A] system that doesn't provide them [blacks] with a significant attachment to the labor force, doesn't provide them with upward mobility . . . historically has tended to exclude those of us who happen to be black.

UPS has extended this financial consideration to cover home and car ownership as factors on which negative data could operate to disqualify a job applicant under

the overall evaluation of the applicant as a long term employee.

C. *Work History Questions*

The UPS application form contained several questions relating to an applicant's history and general employment experience which were also used to qualify applicants. The record reflects the unemployment rate among blacks to be nearly twice that of whites. Other evidence of record indicates that more blacks than whites in Ferguson's age and labor category were prone to higher job mobility and greater likelihood of dismissal.

D. *Driving Record Questions*

The UPS application form contained several questions relating to an applicant's overall driving record used to qualify applicants. While applying this criterion as an employment qualification, UPS admitted its exclusionary effect on blacks.

UPS did not perform any studies on its employment qualifications to determine whether they reasonably predicted successful performance on the job and no evidence was introduced on the subject.

After the two days of hearings, the Commission's Hearing Panel issued its Decision on March 3, 1972 and on March 8, 1972 it became an Order of the Commission (App. A, *infra.*). The Commission found that Ferguson had been the victim of racially discriminatory hiring practices. It ordered UPS to cease and desist from the use of the aforementioned hiring practices relating to the job which were found to be racially discriminatory and awarded Ferguson $150 back pay.

Subsequently, UPS appealed the Commission's Decision and Order to the Circuit Court for Prince George's County, Maryland. The Commission and Ferguson raised constitutional issues before the Circuit Court regarding the Commission's duty to eliminate racially discriminatory employment practices (App. E, *infra.*) The Court reversed the Commission's Order, distinguishing federal precedent and denying relief to eliminate the racially discriminatory employment practices found to exist. The circuit court, however, did not disturb the Commission's finding that UPS's employment practices were racially discriminatory.

The Commission and Ferguson appealed from the judgment of the circuit court to the Court of Appeals of Maryland. The United States Equal Employment Opportunity Commission (EEOC) filed their first *amicus curiae* before a state court supporting the action of the Commission. In their brief to the Court of Appeals, Petitioners again raised constitutional issues regarding the duty of state instrumentalities to eliminate racially discriminatory employment practices (App. E *infra.*).

Thereafter, by a decision dated November 6, 1973, the Court of Appeals of Maryland affirmed the judgment of the circuit court on the grounds that UPS had not been provided adequate administrative notice of the issues litigated under state law. The Maryland court in its opinion did not cite, distinguish or discuss federal precedent or the constitutional issues raised. Despite the Commission's findings to the contrary, the Court of Appeals concluded that Ferguson had not been discriminated against personally (App. D *infra.*, p. D-4).

REASONS FOR GRANTING A WRIT OF CERTIORARI

A State Court is Prohibited under the Federal Constitution from Creating a Strict Rule of Procedure which denies to an Individual Relief from Racially Discriminatory Employment Practices.

A. Introduction

The decision of the Court of Appeals of Maryland effectively sanctions racial discrimination under circumstances in which this Court specifically held it to be unlawful. The decision is in square conflict with *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The decision also negated the Commission's order to eliminate a systemic employment practice found to be racially discriminatory, an action that seriously misconstrues the nature of discrimination, the constitutional basis upon which a state fair employment practices commission operates, and the relationship between federal and state civil rights laws as established by Congress. Because the Court of Appeals has failed to follow the controlling precedent established by this Court, its decision should be reversed.

In another state case, *Connecticut Commission on Human Rights and Opportunities* v. *Veeder-Root Company, A Division of Veeder Industries*, — Conn. —, — A. 2d —, 6 EPD ¶ 8958 (1973) (*Petition for Cert. filed*, 42 U.S. L.W. 3340 (U.S. Oct. 27, 1973) (No., 73-703), the highest court of Connecticut also denied relief from systemic employment practices found to be discriminatory. The decisions of both the Maryland and Connecticut courts raise identical and substantial federal questions before this Court; that instrumentalities of a state have failed to execute a constitutional duty to eliminate identified discriminatory employ-

ment practices by the erection of arbitrary and unconstitutional procedural barriers to such relief.

The Maryland Commission is an administrative agency created with full powers to implement and enforce the state Fair Employment Practices (FEP) law.[1] Art. 49B, Md. Code Ann. §§ 17 *et seq.* (1957, 1973 Supp.) (App. F, *infra.*). The Maryland FEP law is identical in all substantive respects to its federal counterpart, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (1970), as amended by the Equal Opportunity Act of 1972, 86 Stat. 103 (1972) (*Compare,* substantive provisions, App. F and G, *infra.*). Title VII is administered by the Equal Employment Opportunity Commission (EEOC) which, like the Maryland Commission, receives or initiates complaints, conducts investigations thereof, and attempts to effect conciliation, 42 U.S.C. 2000e-4 (1970);

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[1] The Maryland Commission in form and operation was patterned after the National Labor Relations Board (NLRB). Compare 29 U.S.C. § 160 (1970) with Art. 49B, Md. Code Ann. §§ 12-15 (1957, 1973 Supp). The NLRB has been held to possess authority to vindicate the public interest. *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952); *NLRB* v. *West Kentucky Coal Co.*, 116 F.2d 816 (6th Cir. 1940); *cf. Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). Similarly, state civil rights agencies are like the NLRB in exercising full powers to vindicate the public interest as well as private rights. *City of Highland Park* v. *Michigan Fair Employment Practices Commission*, 364 Mich. 508, 111 N.W. 2d 297 (1961); *Arnett* v. *Seattle General Hospital*, 65 Wash. 2d 22, 395 P.2d 503 (1964). For an analysis of the history and relationship of state FEP agencies to federal laws, see, Tierney, *Separate But Equal—An Analysis of State Civil Rights Law Enforcement and its Interaction with Federal Laws*, 49 Notre Dame Lawyer, 122 (1973); Bonfield, *An Institutional Analysis of the Agencies Administering Fair Employment Practices Laws*, 42 N.Y.U.L. Rev. 823, 1035 (1967); Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 Vand. L. Rev. (1965).

but, unlike the Maryland Commission, EEOC possesses no cease and desist authority. Adjudication of Title VII charges and the formulation of remedies thereunder rests with the federal courts. 42 U.S.C. 2000e-5 (1970). In this respect the Maryland Commission singularly performs the same functions that are jointly performed under Title VII by EEOC and the federal courts. The Maryland Commission has been certified by the federal government as a substantially equivalent state agency under federal law.[2]

B. The State Procedural Barrier—Inadequate State Grounds

The Maryland Court of Appeals fashioned a strict notice requirement for Commission proceedings which is inconsistent with state law and denies to Ferguson fundamental fairness in the vindication of his rights.

Ferguson, when he filed his charge of racial discrimination, clearly alleged unlawful practices by UPS in its hiring process (App. B *infra.*, p. B-2-3). The Commission staff's report summarized the use of arrest and conviction records, driving records, and work history in the UPS hiring process:

> To use such criteria, in the absence of job relatedness, is to structure into the hiring process factors which tend to eliminate a disproportionate number of blacks and thus to have a discriminatory effect upon blacks (App. B, *infra.*, p. B-8).

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[2] 37 Fed. Reg. 9214, May 6, 1972 (Employment); 37 Fed. Reg. 16540, Aug. 18, 1972 (Housing). With the enactment of its FEP law, Maryland has adopted federal law as its own and the state courts' interpretation of that federal law is reviewable by this Court. *Standard Oil Co. of California* v. *Johnson,* 316 U.S. 481 (1942).

Thus the litigable issue was framed and UPS was provided with actual notice of it. The hearing proceeded on basis of this issue, with UPS being afforded a full opportunity to justify its hiring process (App. A, *infra;* p. A-9). UPS raised no objection at hearing to the proof submitted in support of this issue. After considering all the evidence, the Commission ordered *inter alia* that UPS cease and desist from the use of those hiring practices found to have a discriminatory effect (App. A, *infra.* p. A. 9-10).

The Maryland court then vacated the Commission's Order on the basis of a strict notice standard without an explanation of the court's factual basis for finding the notice insufficient or the reasons for according the Commission treatment different than manifested in its decisions regarding other Maryland administrative agencies. *See, Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 244-245 (1969) (J. Harlan, dissenting but concurring on inadequacy of state grounds).

The very Maryland authority dealing with administrative notice cited by the Court of Appeals demonstrates the Commission's notice was legally sufficient. In *Cassidy* v. *Baltimore Co. Board of Appeals,* 218 Md. 418, 146 A 2d 896 (1958), the Maryland court held that administrative notice need only apprise the respondent of the *character* of the administrative action and such notice is sufficient even though it may fall short of judicial standards. Furthermore, Maryland follows the principle that actual notice and appearance cures a failure to give written notice or any deficiencies therein. *Clark* v. *Wolman,* 243 Md. 597, 221 A. 687 (1966). A plain reading of the Commission's notice shows it clearly complied with these principles of Maryland law.

Significantly, another authority relied upon by the Maryland Court to erect its procedural barrier, Professor Davis, holds that administrative notice is liberally construed and a failure to object to the scope of issues actually litigated results in an amendment to the complaint and thus operates to cure any notice defect. DAVIS ADMINISTRATIVE LAW § 8.02 (1972 Vol.) citing, *Associated Home Builders of the Greater East Bay, Inc.* v. *NLRB,* 352 F. 2d 745 (9th Cir. 1965); and decisions of this Court: *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197 (1938); and *NLRB* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938). As in this Court's decision in *Mackay,* it is clear that there was no misunderstanding as to the factual and legal basis involved in the Commission's hearing.[3] Alternatively, the failure of UPS to object to the issue actually litigated cures any alleged defect in the administrative notice. *Associated Home Builders of the Greater East Bay, Inc.* v. *NLRB, supra.*

Under the Maryland rule of *Cassidy* v. *Baltimore Co. Board of Appeals, supra,* administrative notice

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[3] Also, even assuming *arguendo* Ferguson's complaint and the Commission report were insufficient notice to support the relief granted, the Maryland court's decision was still an arbitrarily strict procedural rule. The Commission's procedural requirements are similar to the NLRB in that amendments can be made to the complaint at any time. Art. 49B, Md. Code Ann. § 14(e) (1957, 1973 Supp.). The NLRB has been consistently permitted to amend its complaint to conform to the proof. *Consolidated Edison* v. *NLRB, supra at* 224-225. With this cited authority before it, the Maryland court should have treated Ferguson's complaint as amended by the Commission report and the proof of record. The court's failure to do this operated to deny to Ferguson fundamental fairness in that it required of him the ability to originally articulate his grievance with a lawyer's precision. *See, Love* v. *Pullman,* 404 U.S. 522 (1972).

must also be read in the light of the provisions of law under which it is given. Since the substantive provisions of the Maryland FEP law and Title VII are identical, UPS had the responsibility to read the notice in light of Title VII decisional law.

Title VII has been repeatedly interpreted to embody important concepts regarding the status occupied by persons seeking relief thereunder. The very term "discrimination" has been defined to mean unlawful conduct directed at a class. *Hall* v. *Wertham Bag Corp.*, 251 F. Supp. 184 (M.D. Tenn. 1966). Indeed, employment discrimination is considered to be an unlawful practice involving a class characteristic. *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969). An individual plaintiff can obtain class-wide relief. *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971); *Bowe* v. *Colgate-Palmolive Co., supra; Jenkins* v. *United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1968); *see also, Bailey* v. *Patterson*, 323 F. 2d 201 (5th Cir. 1963). Indeed, the individual is considered a private attorney general vindicating the public interest. *Graniteville Co., Sibley Division* v. *EEOC*, 438 F. 2d 32 (4th Cir. 1972); *Jenkins* v. *United Gas Corp., supra.*

The cited authority, when applied to the Commission's proceedings, clearly shows that adequate notice of the issues was given. The Maryland court inconsistently applied its own administrative notice standard to the Commission and, in effect, fashioned a novel and unfair procedural requirement for this case. *NAACP* v. *Alabama, ex rel. Flowers*, 377 U.S. 288 (1964); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *see Sullivan* v. *Little Hunting Park, supra.* Such grounds are not adequate to bar review by this Court.

C. Failure to Apply Controlling Precedent

The effect of the state's strict procedural rule also operates to deny to Maryland citizens under state law relief to which they are entitled under federal law and guaranteed by the Federal Constitution. Under decisions of this Court when a person like Ferguson alleges employment discrimination, that allegation requires an examination of the *consequences* of the challenged employment practice upon members of Ferguson's class, that is, blacks. *Griggs* v. *Duke Power Co., supra; McDonnell-Douglas* v. *Green,* 411 U.S. 792 (1973); *see, Jenkins* v. *United Gas Corp., supra.* The Respondent's practices, not any individual treatment, were found to have victimized Ferguson. It is impossible to separate Ferguson from either the application of these practices or from his class characteristic. Therefore, in order to establish that Ferguson was a victim of race discrimination, the general employment practices at Respondent's facility must be examined and then remedied, if discriminatory.

The term "discrimination" and prohibited employment practices are not controlled by procedural sections of the state FEP law; but rather, are controlled by the substantive provisions of law. Consequently, the purpose of an individual charge of discrimination processed under either federal or state law is merely to initiate the subsequent law enforcement process, and does not determine the limits of that process. *Graniteville Co., Sibley Division* v. *EEOC, supra; Jenkins* v. *United Gas Corp., supra; Sanchez* v. *Standard Brands, Inc.,* 431 F. 2d 455 (5th Cir. 1970); *Ironworkers, Local No. 67* v. *Hart,* 191 N.W. 2d 758 (Iowa 1971).

The record below and the findings of the Commission established beyond doubt that the manner by which

UPS applied their employment qualifications to job applicants has an exclusionary effect upon blacks including Ferguson. UPS failed to meet its burden of proving the exclusionary practices, which unquestionably denied Ferguson a job, were related to job performance. *Griggs* v. *Duke Power Co.*, *supra*; *see*, *McDonnell-Douglas* v. *Green*, *supra*. In spite of the record, which was left undisturbed by the state courts, the Court of Appeals concluded:

> Having found that *there was no discrimination against Ferguson personally*, the Commission went on to issue a wide-ranging order, designed to reform what it regarded as United Parcel's discriminatory employment practices. *Ferguson* v. *United Parcel Service*, 270 Md. 202, 206, 311 A. 2d 220, 222 (1973) [Emphasis Supplied].

By such language the Court of Appeals has manifested clear error by either a misapplication of the principles of *Griggs* or a complete disregard of them. This Court in *Griggs* noted that for racially discriminatory employment practices to be unlawful they need not be associated with an employer's motivation or intent. The Commission correctly applied *Griggs* after finding that Ferguson was, indeed, not the victim of an individual or intentional discriminatory act. The Commission then found that Ferguson was discriminated against by the *consequences* of UPS' employment practices. For the Maryland court to characterize that there was no discrimination against Ferguson personally, denies to Ferguson any benefit from the concepts established under *Griggs;* and, consequently, defines the term "discrimination" under Maryland law in a manner which is in square conflict with controlling precedent. In effect, the Maryland court has

sanctioned discriminatory employment practices found by this Court to be unlawful.

D. Abdication of Constitutional Duty

The Maryland court's decision has avoided a duty under the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution to eliminate discrimination when it is discovered. It is firmly established that state civil rights agencies and state courts are under a constitutional obligation to enforce the same rights and provide the same remedies in the civil rights field as are available in federal courts. *Sullivan* v. *Little Hunting Park, supra; State of Minnesota* v. *Bergeron,* 290 Minn. 351, 187 N.W. 2d 680 (1971); *Gilliam* v. *City of Omaha,* 331 F. Supp. 4 (D. Neb. 1971), *rev'd on other grounds,* 459 F. 2d 63 (8th Cir. 1972); *see also, Betts* v. *Easley,* 161 Kan. 459, 169 P. 2d 831 (1946). Both federal and state civil rights laws are based upon constitutional principles and merely provide differing mechanisms to vindicate constitutionally protected rights. In effect, a person invoking a state civil rights law substantially equivalent to federal law is also invoking these constitutionally protected rights. Enforcement of these state laws includes a duty to provide constitutional remedies. *State of Minnesota* v. *Bergeron, supra.*

With respect to the instant case, the Maryland court's complete disregard for the discriminatory practices of the Respondent and its failure to cure the practices amount to unconstitutional state action. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). This Court stated in *Burton* that "no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them . . ." *Id.* at

725. By not acting against the Respondent's practices, the state court became a joint participant in the illegal discrimination by permitting it to continue unabated. *Evans* v. *Newton,* 382 U.S. 296 (1966); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *State of Minnesota* v. *Bergeron, supra; Jenkins* v. *United Gas Corp.,* 400 F. 2d 28, 34 (5th Cir. 1968); *see also, Potts* v. *Flax,* 313 F. 2d 284, 289 (5th Cir. 1963).

After finding discriminatory employment practices which operated against Ferguson and others, the Commission proceeded to fashion relief to eliminate each practice found unlawful (App. A, *infra,* pp. A-9-10). This relief was necessary to vindicate Ferguson's rights since any future attempts by him to secure employment would meet the same result under the application of the unlawful practices. This relief was also necessary to vindicate the public interest.

The concept of public interest or class relief has long been recognized as essential to the constitutional *duty* of formulating *complete* relief from a discriminatory practice. *Potts* v. *Flax, supra; Bailey* v. *Patterson,* 323 F. 2d 201 (5th Cir. 1963). Class relief has also been specially applied to employment practices by federal courts under Title VII. *Jenkins* v. *United Gas Corp., supra; Bowe* v. *Colgate-Palmolive Co., supra; Sprogis* v. *United Air Lines, supra.* Indeed, this Court has recognized the class aspects of Title VII. *Griggs* v. *Duke Power Co., supra.*

There is nothing in Maryland law which can repudiate the constitutional duty to afford an individual public interest relief from systemic discriminatory practices. Indeed, decisions of other states have recognized this duty and have accorded the same public interest relief to aggrieved persons filing complaints under state law as would be available under federal law.

Ironworkers, Local No. 67 v. *Hart,* 191 N.W. 2d 758 (Iowa 1971); *Jackson* v. *Concord Company,* 54 N.J. 113, 253 A. 2d 793 (1969); *Richardson* v. *School Board of Independent School District No. 271, — Minn. —,* 210 N.W. 2d 911 (1973).

The Maryland court's use of a strict procedural rule has denied to Ferguson necessary constitutional relief to which he and the public were entitled. Failure to grant this relief amounts to an unconstitutional approval of discriminatory practices.

E. Failure to Apply the Supreme Law of the Land

In *Testa* v. *Katt,* 330 U.S. 386 (1947), this Court ruled that the state court's failure to apply federal standards was in violation of Article VI, Section 2, of the U.S. Constitution which binds state judges to the "supreme law of the land." In effect, this Court ruled that a state judicial body could not, under the Supremacy Clause, deviate from national policy and ignore the necessity of full application of federal rights. Again in *Sullivan* v. *Little Hunting Park, supra,* this position was reaffirmed when this Court granted review of and then reversed the decision of the Virginia Supreme Court of Appeals for failure to act in accordance with federal anti-discrimination standards when the state decision denied relief on state procedural grounds.

Ferguson, by charging UPS with racial discrimination in its hiring practices, invoked federal protected rights. The Maryland court ignored the national policy established by Congress in Title VII when it so narrowly construed under state law employment discrimination and the status occupied by the charging party. Such action operates to frustrate the effective implementation of federal law.

When Title VII was enacted, a cornerstone of the Act included a provision for local enforcement by state civil rights agencies, Congress believing this approach to be the most effective means of eliminating discrimination. *See*, Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1212-1216 (1971). This procedure is effectuated by means of the deferral provisions which has been reviewed by this Court on two occasions. *Love* v. *Pullman*, 404 U.S. 522 (1972); *Crosslin* v. *Mountain States Tel. & Tel. Co.* 400 U.S. 1004 (1971). Under *Crosslin*, a state interest under Title VII cannot be ignored. That Congress intended that state agencies are to be an integral part of Title VII enforcement is further buttressed by the Equal Opportunity Act of 1972, which requires that the result of work under state FEP laws is to be given substantial weight by the federal government. *See*, Section 706(b) of Title VII, as amended March 24, 1972, P.L. 92-226, Sec. 4 (App. G *infra.*, p. G-2, emphasized provisions).

Title VII has been repeatedly interpreted to embody important concepts regarding the status occupied by persons seeking relief thereunder. Title VII has been interpreted to include the doctrine established in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that a complainant is not only seeking to make himself whole, but is also a private attorney general vindicating his rights and the rights of all those persons similarly situated. *Graniteville Co., Sibley Division* v. *EEOC*, 438 F. 2d 32 (4th Cir. 1972); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1970). This important status has been accorded aggrieved persons despite the fact that EEOC Commissioners

and the Attorney General can also invoke Title VII. *See,* 42 U.S.C. 2000e-5(a) and 6(a) (1970).

The Maryland court has denied Ferguson this status on the grounds that the Commission should have initiated its own charge to remedy the discriminatory practices it already identified as a result of Ferguson's charge and forms an integral part of Ferguson's civil rights claim. There is no basis under Maryland law for giving a different meaning and effect to an individual complaint than permitted under federal law. The Maryland law like federal law provides two methods to set the administrative process in motion—a charge by an individual and a charge by the Commission itself. *Compare,* Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(a)(1970). Both methods merely provide alternative means to set the administrative process in motion. Neither method does more than invoke the same law enforcing powers recited elsewhere in the statute. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study,* 18 Vand. L. Rev. 965, 1019 (1965).

The policy behind the private attorney general concept has special application to the joint federal-state Title VII enforcement. The concept has the effect of reducing the incidence of recurring claims, relieving the workload of state and federal civil rights agencies, reducing inconvenience to employers, and promptly vindicating the public interest.[4] It would be absurd if each member of the class discriminated against had to individually seek relief. Such a result would substan-

[4] EEOC Chairman William H. Brown, III, stated that EEOC's current national backlog amounts to over 60,000 cases and is projected to exceed 90,000 by the end of 1974. The New York Times, July 30, 1973, p. 17, Col. 8. See also Crampton, *Causes and Cures of Administrative Delay,* 59 A.B.A.J. 937 (Sept. 1972).

tially increase the caseload of both federal and state courts.

Title VII has also been interpreted as not to impose a lawyer's knowledge to an aggrieved party filing a complaint. *Love* v. *Pullman, supra.* Ferguson or other aggrieved persons may believe that discrimination has occurred but may be unable to perceive or understand all the sources, effects, patterns or practices of an employer's system upon their own personal case of discrimination. The FEP law, both state and federal, contemplates the filing of charges by persons untutored in the technicalities of the law and they should not be barred from class relief because they may not be able to fully articulate their grievances. *Ironworkers Local No. 67* v. *Hart, supra; Jenkins* v. *United Gas Corp., supra; Macklin* v. *Spector Freight System, Inc.*, — F. 2d —, 5 EPD ¶ 8605 (D.C. Cir. 1973).

As already indicated, the Maryland court has applied to Ferguson and other aggrieved persons in Maryland the requirement that they set out their complaints with a lawyer's precision and they cannot obtain relief beyond issues articulated in the complaint. Aside from creating a discriminatory standard in itself so fundamentally unfair as to offend traditional notions of due process, the standard now imposed upon Maryland's aggrieved persons deprives them of their federally protected rights.

While the state law is not required to be a carbon copy of the federal law, *see Associated General Contractors of Mass., Inc.* v. *Altshuler,* 487 F. 2d —, 6 EPD ¶ 8993 (1st Cir. 1973), it cannot be interpreted so as to indirectly water down or emasculate the substantive federal rights it purports to protect. *State of Minnesota* v. *Bergeron, supra; Gilliam* v. *City of Omaha, supra.* Such action by the state court violates the

Supremacy Clause to the same extent as if it had directly refused to consider enforcement of a federal law. The Maryland court cannot be permitted to do indirectly that which it is prohibited from doing directly.

The Maryland decision is similar to that rendered by the Supreme Court of Virginia which was later reversed by this Court in *Sullivan* v. *Little Hunting Park, supra.* There the Virginia court refused to recognize federally protected rights on the grounds of a nonfederal procedural impediment. Significantly, this point was argued to the Maryland court and was succinctly stated by the EEOC:

> The Maryland law, Article 49B, [App. F. *infra.*] recognizes in its remedy provisions an affirmative obligation of the Commission to protect the rights of Maryland citizens both as defined by state law and as set forth in the Constitution of the United States. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969).[5]

CONCLUSION

All that Ferguson sought under state law was the ability to obtain relief from systemic employment practices which operated in a racially discriminatory manner. Moreover, systemic discriminatory employment practices must be eliminated where found. Ferguson was denied this relief by the Maryland court despite his claim which was grounded upon state and federal laws and constitutional principles. Under our federal system, implementation of both state and federal laws should be congruent to reduce duplication of effort. Ferguson cannot be denied relief by a state

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[5] *Amicus Curiae* brief filed by the EEOC before Court of Appeals of Maryland in *Ferguson* v. *United Parcel Service, supra;* p. 19.

court when he asserts a right to which he would have obtained relief under the federal scheme.

The state court's action should not be allowed to stand uncorrected. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP J. TIERNEY,
General Counsel

ELBERT L. A. GUILLORY,
Executive Director

ELIZABETH HOLST TOCKMAN,
Assistant General Counsel

State of Maryland Commission
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701 St. Paul Street
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Chairman, Maryland Commission on
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10 Light Street
Baltimore, Maryland 21202

February 4, 1974

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[6] The Commission gratefully acknowledges the assistance of University of Maryland Law students Michael Ramsey and Thomas Stout in the preparation of this brief.

APPENDIX A

BEFORE A HEARING TRIBUNAL OF THE MARYLAND COMMISSION ON HUMAN RELATIONS

FEP 70-850

WILLIAM L. FERGUSON, *Complainant*

v.

UNITED PARCEL SERVICE, *Respondent*

Order

Pursuant to Rule 11 of the Rules of Procedure of the Maryland Commission on Human Relations, it is hereby ORDERED this 8th day of March, 1972 that the Decision and Recommendations of the Hearing Tribunal dated March 3, 1972 are hereby approved and adopted.

/s/ GEORGE D. SOLTER
George D. Solter, *Chairman*
Maryland Commission on
Human Relations

Decision of Hearing Tribunal

In January, 1970, Complainant William L. Ferguson (Ferguson), a black man, responded to a newspaper ad and applied for a loader-unloader job at the Landover, Maryland "hub" of Respondent, United Parcel Service (UPS). He filled out an employment application form (Complainant Exhibit No. 3) and was interviewed. He was not hired. Ferguson tried twice again, in March, 1970, again in response to ads. These efforts were also unsuccessful, and after his third failure, Ferguson filed the instant complaint, charging UPS with employment discrimination (failure to hire because of race) in violation of Code, Article 49B, sec. 19(a).

UPS, denying any discriminatory action, argues first that the complaint should be dismissed (1) because it was not properly notarized and (2) because the finding of probable cause, required by Article 49B, sec. 13(a), was not supported by facts. We will first consider the motion to dismiss, discussing additional factual aspects of the case at appropriate points.

Motion To Dismiss—Late Notarization

On the second day of the hearing, Ferguson's original handwritten complaint was introduced in evidence as Respondent's Exhibit No. 3. At that time, UPS apparently noted that the handwritten complaint, like the typed version in the Commission file, had been sworn to in December, 1971, although the complaint had been filed in March, 1970. Article 49B, sec. 12(a) provides that the formal complaint process is initiated when a person "claiming to be aggrieved by an alleged discrimination prohibited by" Article 49B files "a complaint in writing under oath."

Whether the apparently late completion of the notarization of Ferguson's complaint might, under some circumstances, be a fatal defect, is a point we need not now decide. The record is clear that UPS was in possession of a copy of the Ferguson complaint for some time prior to the beginning of the hearings. No objection was raised until the second day of testimony. Under these circumstances, we hold that UPS waived any defect in connection with the form or the filing of the complaint. There is no suggestion, in any event, that this alleged defect prejudiced UPS in any way.

The motion to dismiss on this ground is denied.

Motion To Dismiss—Probable Cause

UPS correctly notes that Article 49B, sec. 13(a) and (b) require (1) an investigation of a complaint (2) findings of fact, and (3) a finding that "there is probable cause for

believing that a discriminatory act" prohibited by Article 49B "has been or is being committed. . . ."

UPS further contends that the written findings filed in this case do not justify a conclusion that there was probable cause to believe that UPS has discriminated against Ferguson. Such a conclusion, says UPS, is a jurisdictional prerequisite to the public hearing provided by sec. 14.

Ferguson, while asserting that the findings support a conclusion of probable cause, argues that a staff certification of probable cause is not reviewable by the hearing tribunal.

With this last point we disagree. In *Maryland Commission on Human Relations* v. *Armco Steel,* it was argued that the conciliation and negotiation required by sections 13(b) and 13(c) as a prerequisite to hearing (sec. 14(a)) had not been conducted in good faith. In a decision filed on April 6, 1971, the *Armco* tribunal said:

> Such a finding [of inability to reach agreement] is reviewable by the hearing tribunal not because of any inherent power to supervise staff, but because the nonexistence of an agreement (or the inability to reach an agreement) is a jurisdictional prerequisite to hearing. It is a jurisdictional fact which, if questioned, may be decided by the tribunal just as other disputed facts may be determined. But the finding of no agreement . . . is *prima facie* correct, and the party attacking [it] has the burden of establishing its incorrectness by a fair preponderance of the evidence.

We think the same reasoning applies to the requirement of a finding of probable cause. It, too, is a jurisdictional fact which may be decided by the hearing tribunal if questioned. The existence of criminal penalties for filing a malicious complaint, and a passing reference to possible civil liability (sec. 15(b)) do not indicate a legislative intent to the contrary. We conclude that the legislature intended that there had in fact to be demonstrable probable cause

before a Respondent could be put to the expense and possible public embarrassment of a public hearing.

However, we reject the argument that the finding of probable cause must be approved by the Commission, a majority of the Commission, or one or more Commissioners. Nothing in sections 13 or 14 even remotely suggests this. As the *Armco* panel observed, all the statutory steps prior to the penultimate one of noticing a public hearing are carried out by the Commission staff. Commissioners have no part in this, except when there is a Commissioner complaint under section 12(b).

The legislature has provided a careful separation of the investigatory and prosecuting functions of staff on the one hand and the adjudicatory functions of a commission hearing tribunal on the other. If some sort of magisterial review of findings of probable cause are desirable, in the nature of a judicial officer's determination of probable cause upon an application for a search or arrest warrant, the legislature must provide for it.

Moreover, the review of staff action by a hearing tribunal is narrow in scope. The tribunal may not "second-guess" the staff investigation or substitute its own independent judgment as to the existence of probable cause. As in *Armco*, it may consider whether the steps prior to hearing have been conducted in good faith. If no investigation whatsoever has occurred, or if the written findings reveal no facts which could possibly support a conclusion of probable cause, the tribunal should dismiss a complaint. Absent these factors, the tribunal should do no more than examine the findings. If they show reasonable ground for belief in the existence of facts warranting the proceeding, the complaint should not be dismissed. Nor should an inquiry on this point be permitted to become a preliminary trial on the merits of the case.

In the case before us, the findings indicate that Ferguson was not hired by UPS because his application form

showed what UPS thought was adverse data as to prior employment record, credit standing, arrest and conviction record, and driving record. The investigator concluded that: "To use such criteria, in the absence of job relatedness, is to structure into the hiring process factors which tend to eliminate a disproportionable number of blacks and thus to have a discriminatory effect upon blacks." This conclusion was based upon well-known statistics and studies of which we may take official notice, relating to the position of blacks in American society with respect to employment, unstable family life, arrest records, etc. The investigator was not required to recite these statistics in his findings, although it might have been helpful had he done so. He could apply this generally-known information and his own expertise to the application form, the available information about the composition of UPS' work force, and the reasons given for Ferguson's non-hire, and properly find probable cause to exist under the rule of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

For the reasons stated, UPS' motion to dismiss on this ground is also denied.

The Merits of the Case

With respect to the merits of the case, we find the following additional facts:

Loader-unloader is an entry-level job at UPS. These workers unload packages from a trailer, place them on a belt for sorting and loading on trucks for delivery, and load the packages on the trucks. A loader-unloader must have a degree of physical stamina, and must be able to understand UPS' "sort scheme" so that packages may be properly loaded for efficient delivery. In advertising for applicants for the job, UPS listed only the following criteria: Excellent health, high school graduate or equivalent, age 18, and good employment record; Complainant's Exhibit No. 4A.

At the hearing, the testimony established that high school education was no longer considered a criterion for the loader-unloader job (Ferguson in any event met the high school equivalency requirement) but that the following additional standards were applied:

1. Stability in personal life
2. Minimum of personal financial problems
3. Reasonably good driving record
4. Possession of a valid drivers' license
5. Non-conviction of a felony involving operation of a motor vehicle
6. Absence of bad arrest record.

When Ferguson sought this job, his application revealed that (1) he had had six jobs between July 1958 and the end of 1969; he had been discharged from his last previous employment for "not doing [his] job"; (2) he had been arrested and convicted of non-support, and had served 8 months and 10 days in prison for this offense; (3) he had been behind in time payments, had had property repossessed; and was behind in his time payments at the time he filled in the application; (4) his driver's license had been suspended and subsequently revoked (in 1967) for driving on the suspended license; and (5) he had been involved in one automobile accident. Ferguson told the interviewers that he had a valid driver's license. This was in fact false, although the interviewers were not aware of this falsehood until after Fergusion had been rejected; Respondent's Exhibit No. 6. He failed to disclose some arrests which arose out of domestic disputes, but which did not result in conviction.

Testimony produced on behalf of UPS showed that Ferguson was rejected because of a combination of what UPS deemed a bad prior employment record, a bad credit record,

unstable personal life as evidenced in part by the conviction for non-support, and a bad driving record. UPS officials indicated that no one of these factors would have caused Ferguson's rejection, and perhaps no two of them would have, but the combination of those enumerated had that effect.

There is no evidence that Ferguson was not hired because of particular individual discrimination against him because of his race. Indeed, the record shows that UPS has taken a number of steps to train its personnel in some aspects of human relations, and to discourage indivdual discrimination. But lack of what might be called personal discrimination does not exonerate UPS. Under *Griggs* v. *Duke Power Co., supra,* if "an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

To put it another way, title VII of the Federal Civil Rights Act of 1964, which is in essential particulars identical to the Maryland FEP law, requires the elimination of artificial, arbitrary and unnecessary barriers to employment if those barriers operate individiously on the basis of race. When an employment practice operates to exclude blacks, it is prohibited, notwithstanding the employer's lack of discriminatory intent, unless the employment practice is shown (by the employer) to be essentially related to job performance. We read the State law as embodying the same requirements.

The record is replete with evidence of the discriminatory and disparate effect UPS' criteria are likely to have with respect to blacks of Ferguson's class (young, unskilled, limited education). Considering, first "good employment record", Complainant's Exhibit No. 9 shows that the unemployment rate among blacks as nearly twice that of whites. Blacks in Ferguson's age and skill category are prone to higher job mobility and more frequent dismissal than whites in the same group. The testimony of Dr.

Homer Favor supports this view. Thus, use of "good employment record" as a job standard, has a disparate effect tending to exclude blacks.

Similar economic factors produce a similar conclusion with respect to credit ratings or credit status; *Johnson* v. *Pike Corp. of America*,—F. Supp.—, 3 FEP cases 1025 (C.D. Cal. 1971).

It is also abundantly clear that use of arrest records and conviction records, especially in the domestic relations area, has a disparate effect with respect to blacks; Complainant's Exhibits 5 and 7; *Carter* v. *Gallagher*,—F.2d. —, 4 FEP cases 121 (8th Cir. 1972); *Gregory* v. *Litton Systems, Inc.*, 316 F. Supp. 401 (N. D. Col. 1970). This would extend to use of motor vehicle arrest and conviction records.

The high school education standard was conceded by UPS to have no job relationship, and has been dropped as a selection criterion.

That the use of these criteria in fact discriminated against blacks is indicated by certain additional facts. About 50% of the applicants for loader-unloader were blacks. During the period Jan. 1, 1970 through March 31, 1970 (the period during which Ferguson applied and was rejected) 95 men were hired as loader-unloaders. 36 of these (38%) were minority group people; Complainant's Exhibit 4B-13. We note, also, that at relevant periods in time, UPS' Atlantic Division was less than 18% minority in the category including loader-unloaders; Respondent's Exhibits 7 and 8. In 1970, 18% of Maryland's population was black. The blue-collar work-force in Maryland was 49.6% black.

We conclude that the application of the job standards employed by UPS operated to exclude blacks from the loader-unloader job. Their application to Ferguson in fact excluded him from this job.

As we have noted, criteria having such an effect may sometimes be used, but only if the user demonstrates that the standards are essentially related to job performance.

UPS has advanced many reasons for use of the criteria referred to—need for a stable work force, Dept. of Transportation regulations regarding certain types of convictions, danger of pilferage if employees are in financial trouble, etc. But by UPS' own admission, it has never attempted to validate any of these criteria by performing studies or tests to determine whether or not the existence of such factors as frequent job changes, non-support convictions, tardiness in time payments, poor driving record, etc., in fact have an adverse effect on an employee's ability to perform the job of loader-unloader in a steady, efficient, honest manner. Under *Griggs*, the burden is on UPS to demonstrate this, if it appears that the criteria tend to have a disparate effect on black applicants. UPS has not met this burden. There is nothing in this record which would permit us to do more than speculate as to whether or not there is a substantial relationship between any standard and ability to perform effectively as a loader-unloader, or even ability to become a satisfactory 20-year employee of UPS.

Therefore, we conclude that Ferguson was the victim of illegal racial discrimination.

Relief To Be Awarded

A. *Cease and Desist*

UPS is ordered to remove from its application forms for the loader-unloader job (or to direct applicants not to complete those portions of the forms containing) questions relating to completion of high school education, arrests, convictions, home ownership or rental, tardiness in making time payments, wage assignments or garnishments, repossessions, refusal of bond, suits for non-payment,

bankruptcy, refusal of credit, current tardiness in time payments or loans, and driving records. Questions pertaining to past employment shall be limited to the immediately preceding employment, or to employment involving elements (such as physical stamina) pertinent to the loader-unloader job.

Questions relating to any of these matters except prior employment as limited above will not be utilized by UPS until such time as it has presented to general counsel for the Commission studies or other similar data demonstrating that the particular matter bears a demonstrable relationship to effective job performance as a loader-unloader. Upon the presentation and approval by general counsel of such a study, general counsel shall permit UPS to resume use of the pertinent question or questions, and the effect of this order shall terminate as to those particular matters.

B. *Back Pay.*

Art. 49B, Sec. 14(e) authorizes us to require a respondent "to take such affirmative action as will effectuate the purposes" of the FEP subtitle. This includes an award of back-pay in appropriate circumstances; *Valcourt* v. *Great A & P Tea Co.*, FEP 70-918 (1972).

The purposes of the FEP subtitle include, of course, redressing grievances suffered by the victims of discrimination, as well as preventing future discrimination. Had UPS not applied unlawfully discriminatory criteria to Ferguson, he would have been hired. Thus, he suffered financial loss by virtue of this discrimination.

The extent of the loss actually caused by discrimination, however, must necessarily be slight. UPS customarily checked out application information after hiring. Had it done so in Ferguson's case, it would have discovered the

falsehoods he had recounted, and no doubt would have fired him, and justifiably so; see statement pertaining to misrepresentation of facts in the application form (Complainant's Exhibit No. 3).

We think Ferguson is entitled to some back pay, but cannot find, on this record, entitlement for more than a week. In January, 1970, the loader-unloader pay was $3.75 per hour, or $30 per eight hour day. For a five-day work week, this would amount to $150.00. We direct UPS to pay Ferguson $150 in back pay.

C. *Damages for Humiliation.*

The record in this case contains no evidence which would justify a monetary award for mental suffering or humiliation. Thus, we need not, and do not, decide whether we have the power, in a proper case, to make such an award.

It is so ordered this 3rd day of March, 1972.

LANE KOLKER BERK
JAMES A. MADISON
WILLIAM E. ROSE
WILLIAM H. ADKINS, II
Hearing Tribunal Chairman

Opinion concurring in part and dissenting in part.

Commissioner Blank concurs in all of the aforegoing decision except that portion awarding back pay to Ferguson. He believes that the remedy of back pay is entirely discretionary with the hearing tribunal, and that in view of the record produced before the tribunal in this case, there is insufficient evidence to justify the exercise of discretion to the extent of awarding any back pay to Ferguson.

ALVIN L. BLANK

Pursuant to Rules 9 and 11 of the Commission's Rules of Procedure for Public Hearing, the aforegoing decision and recommended order, including an opinion of Commissioner Blank, concurring in part and dissenting in part, are certified to the Commission this 3rd day of March, 1972.

WILLIAM H. ADKINS, II
William H. Adkins, II
Hearing Tribunal Chairman

APPENDIX B

STATE OF MARYLAND
COMMISSION ON HUMAN RELATIONS
MOUNT VERNON BUILDING
701 ST. PAUL STREET
BALTIMORE, MARYLAND 21202

WILLIAM L. FERGUSON

v.

UNITED PARCEL SERVICE

FEP 70-850

Notice of Public Hearing

The Maryland Commission on Human Relations, pursuant to Section 14(a) of Article 49B of the Annotated Code of Maryland, hereby notifies United Parcel Service, 8325 Ardwick-Ardmore Road, Landover, Maryland 20785, that it is required to answer the charges of the complaint, received March 30, 1970, and Written Findings and Conclusions, dated October 30, 1970, in the above entitled case, copies of which are attached hereto, at a public hearing before the Commission at 9:30 A.M., Thursday, January 20, 1972 at the Commission's offices, 701 St. Paul Street, Baltimore, Maryland 21202.

GEORGE D. SOLTER
Chairman
On Behalf of the Commission
on Human Relations

December 16, 1971

3-30-70

B-2

Complaint of Discrimination in Employment

(under Provisions of Article 49B, Annotated Code of Md.)

The act of discrimination must be based on race, color, religious creed, sex or national origin.

Name *William L. Ferguson* Telephone *735-9136*

Address *7909 Pennsylvania Ave., Apt. 202*

City—*Suitland* State—*Maryland* Zip Code *20028*

Name of Company, Labor Organization, or Employment Agency Involved—*United Parcel Service*

Exact Date of Discrimination *3/16/70*

Address *8325 Ardmore/Ardwick Road, Landover, Maryland*

Discrimination for ☒ Race or Color

What did it involve? ☒ Hiring

Have you filed a complaint with a Federal, State or local Agency? Check Yes ☐ or No ☐

The Complaint: Tell the full story of this act of discrimination. Show all dates, places, and the names and titles of persons involved.

I would like to file a complaint against the United Parcel Service Co., of Landover, Md., for discrimination, because of my race or color. I filed an application with this company for employment but was not hired. The application was made in December of 1969. I have had three different interviews in the past three months and was still turned down by them. I have even talked to the supervisor of personnel. The personnel manager told me Tuesday that he would talk to the interviewer about my application. The last time, I was interviewed was March the 16th and I was turned down again. The last time I was interviewed for the third time, I was told my chances of being hired were

as good as anyone else who was being interviewed. So if my chances are that good, why do their interviewers still turn me down for employment at this company.

No civil or criminal action based on the allegations set forth in this complaint have been instituted by the complainant in any court. I do hereby attest that I have read the foregoing complaint, know the contents thereof, in that the complaint is based upon my own personal knowledge except as to matters stated on information and belief, and that, as to those matters, I believe the same to be true.

/s/ WILLIAM L. FERGUSON
Signature of Complainant

Sworn To and Subscribed:
Before me this 20th day
of December, 1971.
/s/ ALICE I. THOMAS
Notary Public

(SEAL) *Baltimore Co., Md.*

My Commission Expires July 1, 1974.

[Italicized portion of complaint was completed by Mr. Ferguson.]

B-4

STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS

Written Findings and Conclusions

FEP 70-850

WILLIAM L. FERGUSON

v.

UNITED PARCEL SERVICE

On March 26, 1970, the Maryland Commission on Human Relations received a complaint of racial discrimination in employment, failure to hire, from Mr. William L. Ferguson, against United Parcel Service Company.

United Parcel Service Company which has its many branches throughout the State and Country, has its branch in question located at 8325 Ardmore/Ardwick Road, Landover, Maryland. This Company specializes in small package delivery and employs as of January 24, 1970, 1,716 employees in the State of Maryland and 512 employees at the Ardmore/Ardwick branch. As such the respondent corporation is an employer as defined in Article 49B of the Annotated Code of Maryland s/s 18(b), subject to the unlawful employment practices outlined in s/s 19, and is consequently subject to the jurisdiction of the Maryland Commission on Human Relations.

COMPLAINANT'S STATEMENT

In his formal complaint and in a subsequent interview held on April 14, 1970, Mr. Ferguson, hereinafter referred to as the complainant, described his experiences with the respondent as follows:

In December, 1969, in response to an advertisement which appeared in the Washington Post Newspaper he applied for a position on the 5 p.m. to 2 a.m. shift as a trailer loader-unloader. On his application and in the interview which followed, he indicated that his driving license was

revoked, but that he could secure a new one, and that he had been imprisoned for non-support and was presently on probation for same.

After not hearing from the respondent as was promised and observing that advertisements were still being published in the Washington Post Newspaper, the complainant called the respondent establishment and reported that he had an application on file for the advertised position. This call resulted in a second interview in which the complainant reported that he had obtained a driver's license. He was informed, however, that the position has been filled.

On March 16, 1970, the complainant observed that an advertisement was still in the newspaper; he went to the respondent establishment at which time a third interview was held. During that interview the complainant was told that his chances of being employed were as good as all other applicants, but that he should not keep returning for interviews. Two subsequent phone calls to the Personnel Manager, who explained that he probably would not be hired, proved futile. He explained that if his interviewers had not hired him in three attempts, the likelihood of his being hired was remote.

Respondent's Statement

On May 7, 1970, this investigator went to the respondent corporation and interviewed Mr. James Phelps, Personnel Manager. After Mr. Phelps was given a copy of the complaint, he explained that he would not be able to comment until he could review the complaint's application. That application, he explained, was in a vault with all others which were three months old or older. As it would take some time to secure the application from the vault he suggested a subsequent interview. He did present an overview of the Company, however, and reviewed with this investigator, the Company's affirmative action policy.

In the second interview with Mr. Phelps on May 14, 1970, he related that applicants are hired on a competitive basis and that applicants who reflect a record of instability, as did the complainant, are not hired. Mr. Phelps cited the complainant's employment history as: Resignation from two of his past six jobs; termination by his last employer, Westinghouse, for not performing his job duties; suspension and revocation of driver's license since 1967, after an accident; involvement in domestic problems and delinquency in meeting those financial obligations.

FINDINGS AND CONCLUSIONS

Requirements for the position as loader-unloader were, as advertised:

Excellent Health
High School Graduate or Equivalent
Age 18
Good Employment Record

The respondent annually files a combined Employer Information Report which reflect statistical data for the entire Atlantic District: 23 units in Maryland, Delaware, and Virginia.

Respondent reports that 95 employees were hired as loader-unloaders during the period in question, December 1, 1969 to March, 1970: 59 white; 36 non-white.

Complainant's application indicates that he applied on January 6, 1970 and returned on March 5, and March 16, 1970.

Comments noted by the interviewer on March 16, 1970, whose initials are illegible, indicate that the complainant has "personal problems."

Reasons submitted by Mr. Phelps, Personnel Manager, for refusing to hire the complainant are, at best, contrived, and are not consistent with those submitted by the employ-

ment interviewer as cited above. In the investigation of the complaint, this investigator did not review the applications of the 59 successful white applicants to determine whether or not the same criteria were applied to all applicants, black and white. Suffice to say that even if such criteria is uniformly applied, such factors as personal and domestic problems, financial delinquency, and license suspensions, have no relevance to the position for which the complainant was applying. Possession of a driver's license is not listed as a requirement of the job as advertised by the respondent. Consequently, that factor could not objectively be a reason for denying employment to the complainant. Further, since the complainant had obtained a driver's license, thus being absolved by the Maryland Department of Motor Vehicles of any prior convictions, it appears questionable that the respondent could continue to hold him liable. Personal and domestic problems and the resulting financial difficulties resulting therefrom cannot be viewed as job related criteria and are, therefore, not valid reasons for refusing to hire. In an employment record which reflects a work history of more than ten years, the respondent would seek to castigate the complainant for resigning on two occasions; the first, nine years and the second time 18 months prior to his application with the respondent. The one factor which might have some importance to the complainant's application is his discharge from Westinghouse Electric Corporation. The positions in question are quite dissimilar, however, and there is no indication that the respondent sought any information concerning the discharge. To use such criteria, in the absence of job relatedness, is to structure in to the hiring process factors which tend to eliminate a disproportionate number of blacks and thus to have a discriminatory effect upon blacks.

In light of the foregoing, this investigator submits there is probable cause to believe that the complainant was discriminated against as alleged.

The respondent files a joint EEO-1 report for the Atlantic District: 23 facilities in Maryland, Delaware and Virginia which reflects as of January, 1969 an employment record of 16% black employees. As the Personnel Manager refused to provide statistical data for the Ardmore-Ardwick facility, it is impossible to determine at this time its racial complement and patterns of placement. In view of this, investigation and findings in the area are suspended.

/s/ TREADWELL O. PHILLIPS
Treadwell O. Phillips
Executive Director

/s/ ARTHUR E. ARMSTEAD
Arthur E. Armstead
Intergroup Relations Representative

October 30, 1970

APPENDIX C

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MD.

Law No. 51-168

WILLIAM L. FERGUSON, *Complainant*

v.

UNITED PARCEL SERVICE, *Respondent*

Memorandum and Order

William L. Ferguson (Ferguson), a Negro, complained to the Maryland Human Relations Commission (Commission), that he was discriminated against when United Parcel Service (UPS), rejected his application for employment as a loader-unloader. After an investigation and a hearing, the Commission ordered UPS to remove from its application for this job a number of questions, to limit other questions, not to utilize such questions until it is shown that the particular matter bears a demonstrable relationship to effective job performance and to pay Ferguson $150.00 back pay. UPS appealed to this Court.

Upon judicial review the Court is called upon to determine if the Commission acted legally and reached a reasonable decision in dealing with the Complaint in this case.

Two threshold questions are presented: (1) Does failure of an oath to the original complaint render subsequent proceedings void for lack of jurisdiction and (2) Must a finding of probable cause be made by a neutral person rather than the investigator in order for the Commission to proceed.

UPS asserts that the statutory requirement that the complaint be in writing *under oath* is the foundation upon which the entire proceeding rests, is the first of several steps and no subsequent sequential step can be taken until the step

before it has been completed. The language immediately preceding Ferguson's signature on the complaint is: "I do hereby attest that I have read the foregoing complaint, know the contents thereof, in that the complaint is based on my own personal knowledge except as to matters stated on information or belief, and that as to those matters, I believe the same to be true."

The Commission believes this is substantial compliance with the requirement. With this I disagree but the complaint was sworn to at a later date, and the question was not raised by UPS until well after the defect was corrected Reasonable amendments to the complaint may be permitted (¶ 14(c)), and since there was no prejudice shown, I conclude that the defect was waived.

As to the finding of probable cause by the investigator for the Commission, we first look to the wording of the Statute, Art. 49B ¶ 13:

> (a) After the filing of any complaint the executive director shall consider the complaint and shall refer it to the Commission's staff for prompt investigation and ascertainment of the facts. The results of the investigation shall be made as written findings. A copy of the findings shall be furnished to the complainant and to the person, firm, association, partnership or corporation (hereinafter referred to as the "respondent"), against whom or which the complaint is made.
>
> (b) If the finding is that there is probable cause for believing a discriminatory act has been or is being committed within the scope of any of these subtitles, the Commission's staff immediately shall endeavor to eliminate the discrimination by conference, conciliation and persuasion.

¶ 13(a) calls for "written findings by the investigator" and ¶ 13(b) states that "if the finding is that probable

cause exists . . .". It seems apparent that the legislative intent was that such finding be made by the investigator.

Thereafter the procedure is that the Chairman of the Commission causes a written notice to be issued requiring the respondent to answer the charges. It may be assumed that the Chairman would review the entire file and not proceed unless it appeared that there was a reasonable basis for the finding of probable cause by the investigator. Thus there is a check on the investigator's conclusion.

UPS equates this case to criminal cases which require the determination of probable cause by a neutral and detached magistrate before the issuance of a search warrant. In such cases there is Fourth Amendment protection against unreasonable searches and seizures but here the Fourth Amendment is not involved. I hold that as to the finding of probable cause, the procedure followed by the Commission met the requirements of the law.

The Commission found that "there is no evidence that Ferguson was not hired because of particular individual discrimination against him because of his race", but that Ferguson would have been hired had UPS not applied unlawfully discriminatory criteria to him. Yet the Commission also held that upon checking out his application he would have been justifiably fired because of misrepresentations in his application. If he were dischargeable at any time because of a fraudulent misrepresentation, and never was employed by UPS, it is contrary to fundamental legal principles that Ferguson should profit by this. Even if this reason would not eliminate entitlement to back pay there must be a reasonable basis for what is allowed. There is no evidence to support the award of one week's pay. In arbitrarily choosing this amount to award Ferguson there appears to be no more than a guess and a desire to make a nominal award. This part of the Commission's Order should be reversed.

UPS contends that the scope of this case should be limited to its hiring practices as they affected Ferguson

between December, 1969 and March, 1970, during which Ferguson was denied employment. In support of this position, Art. 49B, ¶ 12(a) and (b) are cited. These subsections provide in (a) that any person . . . may file a complaint and in (b) that the Commission may on its own motion issue a complaint in its name.

The complaint, together with the findings of the Commission were, pursuant to ¶ 14, sent UPS by certified mail on December 21, 1971. The complaint was a copy of what Ferguson filed with the Commission (after editing an earlier complaint), on March 30, 1970. This did no more than allege discrimination because of race or color and set forth job seeking odyssey of Ferguson from the time of the first application to UPS until his visit to the Commission. The 3-page findings of the Commission dated October 30, 1970, which I am assuming became a part of the complaint, set forth that reasons given for denying Ferguson employment were not valid and that the criteria used were not job related, and structured "into the hiring process factors which tend to eliminate a disproportionate number of blacks . . .".

Next there must be faced these questions: On the basis of Ferguson's complaint, can the Commission make a full blown inquiry as to the employment practices of UPS and pass valid orders as to such practices after dealing with Ferguson's individual complaint? Is it necessary that a complaint as to general employment practices be filed either by individuals or the Commission under ¶ 12(a) or (b) in order to form a basis for such orders as have been passed in this case, not as to Ferguson, but with respect to UPS's employment practices in general? Is a respondent in these cases vulnerable to any orders the Commission may choose to pass concerning any of its practices, however far beyond those necessary to redress the particular complaint, or must the complaint itself put the employer on notice as to the area and scope opened for consideration?

An agency such as the Commission on Human Relations exercises a limited jurisdiction which is strictly construed, mindful of course, of the legislative intent. *Benson* v. *Public Service Commission,* 141 Md. 398, at 401.

A respondent, in order to choose appropriately the caliber of defensive weapons, should be able to ascertain from the complaint the limits to what could result from the case against it.

In *Jenkins* v. *United Gas Corporation,* 400 F.2d 28, the U.S. Court of Appeals, Fifth Circuit, held that the offer and acceptance of a promotion subsequent to filing a class action by a Negro employee alleging systematic racial discrimination did not render the suit moot as to the employee individually or as to the class he represented. However, the fact that the complaint was in the nature of a class action distinguishes this case from the case at bar for the defendant was on notice of the relief sought.

In failing to employ Ferguson, whatever the allegations of discrimination, the consequences to UPS at worst would be to employ him, pay him back wages and damages for humiliation. In a complaint of a class nature questions contained in the job application may be shown to have an adverse impact on Negro job seekers and require the respondent to produce statistics showing job relationship and business necessity or eliminate the suspected questions. The "probable cause" finding by the investigator signed by the Executive Director of the Commission was limited:

> "In light of the foregoing, this investigator submits that there is probable cause to believe that the complainant was discriminated against as alleged."

This could hardly be taken as requiring a response or permitting relief because of general discriminatory practices as distinguished from specific discrimination against Ferguson.

While there are no requirements as to formality of complaints, either in Art. 49B or in the Rules of Procedure for Public Hearings of the Commission, basic fairness, common sense and the doctrine of strict construction applicable to Administrative Agencies dictate that there *must* be a reasonable limitation to the scope of a complaint. I conclude that when the complaint is made and filed by one person setting up grievances suffered by him individually, the Commission lacks the power to expand the ambit of its orders beyond those appropriate to the redress of the grievances asserted by that complainant. If inquiry develops the existence of objectionable practices generally engaged in, and a broader sweep is sought, the course is simple: Let the Commission file an additional complaint under ¶ 12(b), which procedure appears to be precisely what was meant to be permitted by this subsection.

The terms of the order as to the general employment practices of UPS covered questions on the application form relating to high school education (already abandoned by UPS), arrests, convictions, home ownership or rental tardiness in making time payments, wage assignments or garnishments, repossessions, refusal of bond, suits for non-payment, bankruptcy, refusal of credit, current tardiness in time payments or loans, and driving records. All of these questions were ordered not to be used for loader-unloader applicants.

Questions pertaining to past employment were ordered to be limited to the immediately preceding employment, or to employment involving elements (such as physical stamina), pertinent to the loader-unloader job.

UPS was required not to utilize questions relating to any of the above matter, except prior employment as limited above until studies or similar data demonstrating a relationship to effective job performance are approved by the Commission's General Counsel. It is conceded that this delegation of authority was not proper.

In view of the holding that the complaint in this case cannot validly be broadened to include matters contained in this Order, UPS's position will prevail. Thus it is found that the Order of the Commission as to the award of back pay is unsupported by competent material and substantial evidence, and the Order as to the questions on the application forms of UPS was made upon unlawful procedure.

It is this 9th day of May, 1973, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Orders of the Commission on Human Relations passed in the proceeding be and they are hereby reversed.

RALPH W. POWERS
Judge

APPENDIX D

IN THE COURT OF APPEALS OF MARYLAND

No. 130

September Term, 1973

WILLIAM L. FERGUSON

v.

UNITED PARCEL SERVICE

Before, Murphy, C. J., Barnes, McWilliams, Singley, Smith, Digges, Levine, JJ.

Opnion by Singley, J.

Filed: November 6, 1973

This is an appeal from the order of the Circuit Court for Prince George's County (Ralph W. Powers, C.J.) which had reversed orders entered by Maryland's Commission on Human Relations (the Commission).

The case had its genesis in March of 1970 when Ferguson filed with the Commission a complaint alleging that United Parcel Service (United Parcel) had discriminated against him because of his race when it failed to employ him as a loader-unloader at its Landover, Maryland distribution center. After three interviews with United Parcel, which were unproductive, Ferguson filed his complaint:

> "I would like to file a complaint against the United Parcel Service Co., Landover, Md., for discrimination, because of my race or color. I filed an application with this company for employment but was not hired. The application was made in December of 1969. I have had three different interviews in the past three months and was still turned down by them. I have even talked to the supervisor of personnel. The personnel manager told me Tuesday that he would talk to the interviewer about my application. The last time, I was interviewed was March the 16th and I was turned down again. The

last time I was interviewed for the third time, I was told my chances of being hired were as good as anyone else who was being interviewed. So if my chances are that good, why do their interviewers still turn me down for employment at this company."

It would seem that the Commission regarded Ferguson's complaint as coming within the ambit of § 12(a) of Art. 49B, Maryland Code (1957, 1972 Repl. Vol.) (the Act):

> "Any person claiming to be aggrieved by an alleged discrimination prohibited by any section of this article may make, sign and file with the Human Relations Commission (hereinafter referred to as the 'Commission') a complaint in writing under oath. The complaint shall state the name and address of the person, firm, association, partnership, corporation, State agency, department or board alleged to have committed the act of discrimination together with the particulars thereof; and the complaint also shall contain such other information as may be required from time to time by the Commission."[1]

The conclusion is buttressed by the fact that United Parcel was given notice of a public hearing on Ferguson's complaint, as provided by § 14(a) of the Act:

> "The chairman shall cause a written notice to be issued and served in the name of the Commission together with a copy of the complaint requiring the respondent to answer the charges of the complaint at a public hearing . . . ."[2]

The Commission's hearing tribunal concluded that "[t]here [was] no evidence that Ferguson was not hired

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[1] Section 12(a) was subsequently amended, effective July 1, 1973, an amendment which is of no relevance here, Code (1957, 1973 Supp.) Art. 49B, § 12(a).

[2] Section 14(a) was amended, effective July 1, 1972, again an amendment which is of no relevance here, Code (1957, 1973 Supp.) Art. 49B, § 14(a).

because of particular individual discrimination against him because of his race," but rather that Ferguson was not employed because of the criteria imposed by United Parcel in filling the job of loader-unloader, criteria which the Commission thought bore no relation to job performance and tended to exclude blacks from employment.

The Commission entered an order from which the following is an excerpt:

> "[United Parcel] is ordered to remove from its application forms for the loader-unloader job (or to direct applicants not to complete those portions of the forms containing) questions relating to completion of high school education, arrests, convictions, home ownership or rental, tardiness in making time payments, wage assignments or garnishments, repossessions, refusal of bond, suits for non-payment, bankruptcy, refusal of credit, current tardiness in time payments or loans, and driving records. Questions pertaining to past employment shall be limited to the immediately preceding employment, or to employment involving elements (such as physical stamina) pertinent to the loader-unloader job."

There was a further direction that United Parcel pay Ferguson one week's back pay of $150.00. The finding as regards this part of the order was as follows:

> "The extent of the loss actually caused by discrimination, however, must necessarily be slight. [United Parcel] customarily checked out application information after hiring. Had it done so in Ferguson's case, it would have discovered the falsehoods he had recounted, and no doubt would have fired him, and justifiably so; see statement pertaining to misrepresentation of facts in the application form . . . .
>
> "We think Ferguson is entitled to some back pay, but cannot find, on this record, entitlement for more than a week. In January, 1970, the loader-unloader

pay was $3.75 per hour, or $30 per eight hour day. For a five-day work week, this would amount to $150.00. We direct [United Parcel] to pay Ferguson $150 in back pay."

On appeal to the circuit court, the Commission's order was reversed for what we believe to be two reasons so compelling that it is unnecessary to consider the other points raised by United Parcel. It will be remembered that the case came on for hearing on Ferguson's complaint, filed under § 12(a) of the Act. Having found that there was no discrimination against Ferguson personally, the Commission went on to issue a wide-ranging order, designed to reform what it regarded as United Parcel's discriminatory employment practices.

United Parcel argues that this violated a basic tenet of fair play in administrative proceedings, *Hyson* v. *Montgomery County Council,* 242 Md. 55, 69, 217 A.2d 578, 587 (1966), the right of a party to be given adequate notice of the nature of the proceeding, *Cassidy* v. *Baltimore County Bd. of Appeals,* 218 Md. 418, 421-22, 146 A.2d 896, 898 (1958); *Albert* v. *Public Serv. Comm'n,* 209 Md. 27, 37-38, 120 A.2d 346, 351 (1956), in order that he may prepare his defense, *Board of Medical Examiners* v. *Buck,* 192 Ore. 66, 93, [*In re Buck's License,*] 232 P.2d 791, 802 (1951), 200 Ore. 488, 258 P.2d 124 (1953), *appeal dismissed,* 346 U.S. 919 (1954); Davis, Administrative Law Text § 8.02, at 196 (3d ed. 1972). *See* Code (1957, 1971 Repl. Vol.) Art. 41, § 251 (Administrative Procedure Act).[3] *See also*

[3] "In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto."

Von Lusch v. *Board of County Comm'rs,* 268 Md. 445, 302 A.2d 4 (1973), and *Rasnake* v. *Board of County Comm'rs,* 268 Md. 295, 300 A.2d 651 (1973), dealing with notice in the context of zoning law.

As the lower court pointed out, § 12(b) of the Act provides the mechanism which the Commission should have used, once it determined to broaden the scope of the inquiry—the issuance of a complaint on its own motion and in its own name, which would have given United Parcel the notice to which it was entitled.

The award of back pay to Ferguson is an anomaly, which the court below found to be "unsupported by competent material and substantial evidence," a finding which we shall not disturb, Maryland Rule 886. The Commission conceded that had Ferguson been employed, United Parcel would have been justified in discharging him once it discovered that his application contained representations that were false. The Commission theorized that it would have taken a week for United Parcel to uncover the falsehoods, and that Ferguson was entitled to be paid for this period. That Ferguson would have been employed even had the procedurally infirm employment standards been applicable might well be a matter of conjecture, and there is certainly no support for the notion that if employed, his employment would have lasted a week. As the lower court noted, the determination of the Commission, "[i]n arbitrarily choosing this amount to award Ferguson . . . appears to be no more than a guess and a desire to make a nominal award."

ORDER AFFIRMED, COSTS TO BE PAID BY THE HUMAN RELATIONS COMMISSION

APPENDIX E

Excerpts from Petitioner's Briefs Before the Maryland Courts Raising Federal Questions.

[Petitioner's Brief Before the Court of Appeals of Maryland]

II. Instrumentalities of the State Are Required by the Federal Constitution To Remedy Employment Practices to be Racially Discriminatory.

Ferguson, by filing his complaint, asserted rights which are identical under both federal and state law and are guaranteed under the federal Constitution. Relief provided under the state scheme must be substantially similar to that provided under federal law.

The Commission has a duty under the fourteenth amendment of the U.S. Constitution to eliminate such unlawful discrimination as it may discover. It is firmly established that state agencies and state courts are under a constitutional obligation to enforce the same rights and provide the same remedies in the civil rights field as are available in federal courts. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969); *State of Minnesota* v. *Bergeron,* 290 Minn. 351, 187 N.W. 2d 680 (1971); *see also Betts* v. *Easley,* 161 Kan. 459, 169 P. 2d 831 (1946). [p. 31].

• • •

With respect to the instant case, the Commission cannot disregard the discriminatory practices of UPS or its failure to do so could be construed as unconstitutional state action. That is, the failure to actively seek out and eliminate discrimination makes the state agency or court an "instrument of discrimination." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). The Court stated in *Burton* that "no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them . . ." *Id.* at 725. If it does not act, the state becomes a joint participant in the illegal dis-

crimination by permitting it to continue unabated. *Evans* v. *Newton*, 382 U.S. 296 (1966); *State of Minnesota* v. *Bergeron, supra; see also, Potts* v. *Flax*, 313 F. 2d 284, 289 (5th Cir. 1963); *Jenkins* v. *United Gas Corp.*, [400 F. 2d 28] at 34. [p. 32].

• • •

Additionally, a delicate federal-state relationship could be infringed by a holding that the Maryland Commission cannot grant rights and remedies substantially equivalent to federal law. The Maryland FEP law purports to create rights and remedies identical to those created by federal law. The federal FEP law encourages states to develop rights consonant with federal law. *See*, Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 82 Harv. L. Rev. 832, 843 (1969). [p. 33].

[Petitioner's Brief Before the Circuit Court for Prince George's County, Md.]

B. *Relief Ordered by the Commission is Required by the Constitution*

The courts have been interpreting the federal FEP law as imposing a constitutional duty to grant relief which will remedy all the discrimination found and have been framing their remedies in a broad fashion to achieve this end. *Rosen* v. *Public Service Electric & Gas Co.*, 409 F. 2d 775, (3rd Cir. 1969); *Jenkins* v. *United Gas Corp., supra; U.S.* v. *IBEW, Local 38*, 429 F. 2d 144 (6th Cir. 1970).

In the face of the indisputable national policy to eliminate discrimination, failure or refusal of the Commission to identify and demand those actions necessary to eliminate discrimination may constitute state encouragement of such unlawful discrimination. See *Jenkins* v. *United Gas Corp., supra* at 34; *State* v. *Bergeron*, 187 N.W. 2d 680, 683 (1971). If the Commission fails or refuses to

eliminate unlawful discrimination, such action might be interpreted by private employers as a manifestation of governmental approval and might therefore encourage continued or increased private discrimination. Moreover, if the Commission fails or refuses to demand necessary affirmative relief when legally authorized to do so, it would allow residual discrimination to continue. The fourteenth amendment prohibits such state action. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

The Maryland Commission is both authorized and obligated to fully and effectively protect its citizens from unlawful discrimination as defined by state law, yet it is also important to recognize the independent obligation of the Commission and court to protect federal rights. For this reason the Supreme Court in *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969) reversed the decision of the Virginia courts for failure to act in accordance with federal standards. [pp. 28-29].

APPENDIX F

Excerpts from the Maryland Fair Employment Practices Act, Art. 49B, Md. Code Ann. (1957, 1973 Supp.)

[Substantive Provisions]

DISCRIMINATION IN EMPLOYMENT

Sec. 17. *Declaration of Policy*

It is hereby declared to be the policy of the State of Maryland, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and the promotion of the State's trade, commerce and manufacturers to assure all persons equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, or age, and to that end to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.

• • •

Sec. 19. *Unlawful employment practices*

(a) It shall be unlawful employment practice for an employer:

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, age or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual's race, color, religion, sex, age or national origin.

[Procedural Provisions]

Sec. 12. *Complaint to be filed with or issued by Commission*

(a) Any person claiming to be aggrieved by an alleged discrimination prohibited by any section of this article

may make, sign and file with the Human Relations Commission (hereinafter referred to as the "Commission") a complaint in writing under oath. The complaint shall state the name and address of the person, firm, association, partnership, corporation, State agency, department or board alleged to have committed the act of discrimination together with the particulars thereof; and the complaint also shall contain such other information as may be required from time to time by the Commission. A complaint must be filed within six months from the date of the occurrence alleged to be a violation of this article. A complaint filed with the federal or with a local Human Relations Commission shall be deemed to have complied with the provisions of this section.

(b) Whenever the Commission has received reliable information from any individual or individuals that any person has been engaged or is engaged in any discriminatory practice within the scope of this article, and after a preliminary investigation by the Commission's staff authorized by the chairman or vice-chairman it is satisfied that said information warrants the filing of a complaint, the Commission, on its own motion, and by action of not less than four Commissioners, may issue a complaint in its name in the same manner as if the complaint had been filed by an individual.

[Remedial Provisions]

* * *

Sec. 14.

(e) Cease and Desist Order—If upon all the evidence, the Commission finds that the respondent has engaged in any discriminatory act within the scope of any of these subtitles, it shall so state its findings. The Commission thereupon shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from the discriminatory acts and to take such affirmative action as will effectuate the purposes of the particular subtitle.

APPENDIX G

Excerpts from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1970) as amended by the Equal Opportunity Act of 1972, 86 Stat 103 (1972).

[Substantive Provisions]

Sec. 703. *Discrimination because of race, color, religion, sex, or national origin.*

(a) It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

[Procedural Provisions, Emphasis Supplied]

Sec. 706.

* * *

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, *or by a member of the Commission,* alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such informa-

tion and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. *In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law* pursuant to the requirements of subsections (c) and (d) . . . .

* * *

(c) In the case of an alleged unlawful employment practice occurring in a state, or political subdivision of a state, which has a state or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a state or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such state or local law. If any requirement for the commencement of such proceedings is imposed by a state or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state or local authority. [As amended March 24, 1972, P.L. 92-261, Sec. 4].

APPENDIX H

United States Constitutional Provisions

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [Article VI, Cause 2].

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Fourteenth Amendment, Section 1].

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1196

STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS AND WILLIAM L. FERGUSON,
Petitioners,

v.

UNITED PARCEL SERVICE,
Respondent.

TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Daily Record Co., Baltimore, Md. 21203

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IN THE

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Petitioners,

v.

UNITED PARCEL SERVICE,

Respondent.

TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For the reasons set forth below, Respondent opposes the issuance of the Writ of Certiorari requested by the Petitioners.

OPINIONS BELOW

All of the opinions below are attached to the Petition as appendices.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on November 6, 1973. This Court lacks jurisdiction to review by Writ of Certiorari the judgment entered by the

Court of Appeals of Maryland because the State of Maryland Commission on Human Relations ("Commission") was not a party below, thereby precluding it from seeking review of the judgment below, and because the judgment below was based on adequate and independent state grounds.

QUESTIONS PRESENTED

Whether this Court should exercise jurisdiction to grant a Writ of Certiorari where the state agency petitioning for the writ was not a party to the proceedings below and where the judgment of the highest court of the State of Maryland was based on adequate and independent state grounds.

STATUTORY AND CONSTITUTIONAL PROVISIONS

In addition to the statutory provisions set forth in the Petition there is also involved in this case Senate of Maryland Bill No. 549 and Title 18, U.S.C. §1257. They are set forth in Appendix B and C, *infra* respectively.

STATEMENT OF THE CASE

On March 30, 1970, William Ferguson ("Ferguson") filed a complaint with the Commission alleging that he was denied employment on March 16, 1970, by United Parcel Service ("UPS"), solely on the basis of his race. In a statement of Written Findings and Conclusions, dated October 30, 1970, the Commission investigator assigned to investigate Ferguson's complaint stated that there was probable cause to believe that the complainant was discriminated against as he had alleged. When subsequent good faith efforts by UPS and the Commission to resolve the complaint failed, a public hearing before a Hearing Tribunal composed of five members of the Commission was held on January 24 and 31, 1972.

At the hearing, testimony was taken from witnesses produced by both parties. On March 3, 1972, a decision was certified to the full Commission by the Hearing Tribunal

Chairman. The Tribunal's decision and recommendations were approved and adopted by the entire Commission by its order of March 8, 1972. * (Petition Appendix A.) Briefly stated, the recommendations adopted by the Commission's order required UPS to discontinue using certain questions on its employment application forms and to pay Ferguson $150 in back wages.

An order for appeal to the Circuit Court for Prince George's County, Maryland, was filed by UPS on April 3, 1972. On May 9, 1973, the circuit court passed an Order reversing the Order of the Commission. The circuit court's decision was based upon the failure of the Commission to follow the proper procedures required of it by statute. The Commission's findings with respect to the alleged racially exclusionary effect of the UPS employment criteria in effect when Ferguson applied for employment were neither disturbed nor affirmed; they were not considered. Despite the erroneous suggestion to the contrary in the Petition, the circuit court made no findings that any racially discriminatory practices existed at UPS.

The circuit court found that the notice given UPS was inadequate to support the remedial order which went far beyond the scope of the complaint which UPS had been called upon to answer at the public hearing before the Commission which resulted in the order. Ferguson's complaint before the Commission was an individual complaint, alleging racial discrimination only against himself; it was filed under the provisions of §12(a) of Md. Code Ann., Art. 49B, ("the Act"). (Petition Appendix F, p. F. 1.) The court held that, if the Commission's investigation of the Ferguson complaint led it to think it proper to seek relief of a broader nature than that permitted by the narrow scope of Ferguson's in-

* Except where the distinction may be of some importance the Tribunal shall henceforth be referred to as the Commission.

dividual, specific complaint, then it could and should have filed its own broader complaint under the provisions intended for that specific purpose in §12(b) of the Act. Such a broader complaint could then have satisfied the notice requirements of the Act and formed the basis for a broader public hearing and relief. The Commission did not become a party and did not file a §12(b) complaint.

With respect to the back pay portion of the order, the circuit court held that there was "no evidence to support the award of one week's pay." (Petition Appendix C, p. C. 3.)

Following a denial of a motion for reconsideration, Ferguson appealed to the Court of Appeals of Maryland. The action of the lower court was affirmed by the Court of Appeals on November 6, 1973. In affirming the lower court's action, the Court of Appeals did not reach or decide any issues which were not decided by the lower court. The Court of Appeals specifically declined to reach the question as to whether the employment criteria utilized by UPS during the period when Ferguson applied for employment were racially discriminatory or not job-related.

With respect to the back pay issue, the Court of Appeals affirmed the lower court's reversal of the award of back pay in the Commission's order. The Court of Appeals noted that the Commission had found that:

> [T]here [was] no evidence that Ferguson was not hired because of particular individual discrimination against him because of his race. (Petition Appendix D, p. D. 2 & 3.)

The Petitioners' assertion to the contrary is incorrect.

THIS COURT LACKS JURISDICTION TO REVIEW BY CERTIORARI THE JUDGMENT ENTERED BELOW.

1. *The petitioner Commission was not a party to the proceedings below.*

The complaint which was the foundation of the hearing and the order was the complaint of Ferguson alone. (Petition Appendix B, p. B. 2 & 3.) The Commission was not a party to the complaint. The "Notice of Public Hearing" issued by the Commission clearly stated that the hearing was in connection with Ferguson's complaint and the "Written Findings and Conclusions" prepared in connection therewith. (Petition Appendix B, p. B. 1.) Between the date the complaint was filed by Ferguson on March 30, 1970, and the date of the hearings, the Commission did not seek to amend the complaint to make itself a party as permitted by §14(c) of the Act. (Opposition Brief Appendix A, *infra*, p. A. 1.) Perhaps more significantly, the Commission did not file a complaint in its own name and in its own right as it could have done under §12(b) of the Act. (Petition Appendix F, p. F. 2.) Although the complainant's case was presented at the hearing by the general counsel of the Commission, as required by §14(a) of the Act, such required representation of the complaint can in no way be considered as tantamount to making the Commission a party. The Commission was not made a party at any time during the hearing. Indeed, the Commission did not even request that it become a party or be treated as a party.

The appeal which followed the Commission's order was taken by UPS. While the Commission identified itself on the pleadings in the circuit court as an "Appellee", the Commission was not a party to the appeal, and it was not treated as a party either by the circuit court or by UPS. The Commission's general counsel, of course, continued his representa-

tion of Ferguson, whose award of back pay was being challenged by UPS. As clearly noted in both the circuit court's opinion (Petition Appendix C, pp. C. 4-6) and the Court of Appeals opinion (Petition Appendix D, p. B.5), the Commission could and should have become a party when the case was still before the Commission. However, as indicated, it did not.

The statutory provisions creating and governing the Commission do not vest the Commission with the status of a party in proceedings before it. Indeed, it is only when the Commission is considering a §12(b) complaint that the statute authorizes the Commission to be a party in proceedings before it. (Petition Appendix F, p. F. 6.) In the instant case, the Commission was dealing with a §12(a) complaint, not a §12(b) complaint. In addition, there is no statutory provision which permits the Commission to become an interested party subsequent to a circuit court reversal of a Commission order.

It should be noted that, on February 8, 1974, there was introduced in the Senate of Maryland a departmental bill to amend the statute relating to the Commission. The bill, Senate Bill No. 549, provides, in part:

> If a respondent [in this case UPS] is the aggrieved party seeking . . . judicial review, then the Commission shall have the status of an interested party in all matters, including appeals, and may participate, represented by its general counsel, in all litigation arising thereunder. (Opposition Brief Appendix B, *infra*, p. B. 1.)

The introduction of such a bill clearly suggests that the party in appeals arising from §12(a) complaints.

Not having been a party in any of the proceedings below, the Commission may not seek a writ of certiorari from this Court. *The Wm. Bagaley v. United States*, 5 Wall. 377, 18 L. Ed. 583 (1867); *United States ex rel. Louisiana v. Jack*,

244 U.S. 397, 61 L. Ed. 1222, 37 S. Ct. 605 (1917); *Bayard v. Lombard*, 9 How. 530, 13 L. Ed. 245 (1850). The fact that the Commission is a state agency does not *ipso facto* give it the right to appeal from a court decision regarding a Commission order when the Commission is not a party to the proceedings. *Miles v. McKinney*, 174 Md. 551, 199 A. 540 (1936); *Board of Zoning Appeals for the Town of Elkton v. Guns, et al.*, 259 Md. 368, 269 A.2d 833 (1970); see also *Annotation: Right Of Public Officer Or Board To Appeal From A Judicial Decision Affecting Him Or Its Order Or Decision*, 117 A.L.R. 216. The right to take an appeal is entirely statutory and no agency may prosecute an appeal unless the right is given by statute. *Subsequent Injury Fund v. Pack*, 250 Md. 306, 242 A.2d 506 (1966); see also *Mace Produce v. States Attorney*, 251 Md. 503, 248 A.2d 346 (1968). The Commission has been given no such authority.

Since the Commission was not a party below and cannot be a party here, its sole function in this Court is that of representing Ferguson, the complainant. The only issue which was decided below with respect to Ferguson about which he could complain was the disallowance of the Commission's award of back pay. That issue was not raised in the Petition and, in any event, the issue may not be considered here since the disallowance of the award of back pay in no way questioned the validity of a treaty or statute of the United States or questioned the validity of a state statute on the grounds of its being repugnant to the Constitution, treaties or laws of the United States.

The statutory requirements of Title 28, U.S.C. §1257 permitting this Court to exercise jurisdiction by certiorari over state court judgments have not been satisfied. (Opposition Brief Appendix C, *infra*, p. C. 1.)

2. *The judgment below was based on independent and adequate state grounds.*

The main issue before the Court of Appeals, and now before this Court, is a rather narrow question of the sufficiency of notice in an administrative proceeding. Simply stated, the question is whether the Commission went beyond its power in issuing its order as to the general hiring practices of UPS, in view of the narrow individual complaint which was the notice given UPS and which formed the basis of the public hearing. The circuit court ruled that the Commission proceeded unlawfully in issuing that portion of its order and the Court of Appeals affirmed that ruling.

One of the basic requirements of due process in an administrative proceeding of a judicial or quasi judicial nature, such as the present case, is that a respondent be given fair and adequate notice of the complaint to which an answer must be given and a defense made. *Albert v. Public Service Commission*, 209 Md. 27, 160 A.2d 346 (1956). See also, *Johnstown Coal and Coke Company v. Dishong*, 198 Md. 467, 84 A.2d 847 (1951); 1 Davis, Administrative Law, §804.

In the instant case, Ferguson filed a complaint alleging discrimination against him for race or color involving hiring. (Petition Appendix B, pp. B. 2 & 3.) Analysis of the complaint clearly discloses that Ferguson complained of alleged discrimination which occurred on March 16, 1970. At most, this would pertain to the alleged treatment afforded him from December 1969, when he first applied, through March 1970, when he was last interviewed. Ferguson complained only of alleged discrimination against him; he made no complaint or charge of discrimination by UPS in its general hiring practices. He made no charges whatsoever relating to any period of time other than the period of December 1969 to March 1970.

This complaint was investigated by the Commission's staff and the results of the investigation were embodied in Written Findings and Conclusions dated October 30, 1970. When conciliation efforts failed, the file was certified and the respondent UPS was notified on December 16, 1971 of a public hearing on Ferguson's complaint. Although over a year had elapsed between the time of the completion of the Commission's investigation and the notice of public hearing, the Commission made no effort to amend the complaint to include UPS' general hiring practices or any other period of time, or to initiate a Commission sponsored complaint under §12(b) of the Act.

Following the public hearing on Ferguson's individual complaint, the Commission issued its order. In its order, the Commission found, with regard to Ferguson's individual complaint:

> There is no evidence that Ferguson was not hired because of particular individual discrimination against him because of his race. Indeed, the record shows that UPS has taken a number of steps to train its personnel in some aspects of human relations, and to discourage individual discrimination. (Petition Appendix A, p. A. 7.)

After having found this, the Commission proceeded to go beyond the scope of the complaint and issue an order requiring UPS to revamp its general hiring practices. The circuit court and the Court of Appeals correctly held that the Commission's attempt to issue such an order was invalid because the Commission lacked the power to expand the ambit of its orders beyond those appropriate to the redress of the grievances asserted by the complaint upon which the public hearing was based. The circuit court even suggested to the Commission a simple method of proceeding which would be proper under the Act:

> If inquiry develops the existence of objectionable practices generally engaged in, and a broader sweep is

> sought, the course is simple: Let the Commission file an additional complaint under §12(b) which procedure appears to be precisely what was meant to be permitted by this subsection. (Petition Appendix C, p. C. 6.)

The same point was made by the Court of Appeals:

> As the lower court pointed out, §12(b) of the Act provides the mechanism which the Commission should have used, once it determined to broaden the scope of the inquiry — the issuance of a complaint on its own motion and in its own name, which would have given United Parcel the notice to which it was entitled. (Petition Appendix D, p. D. 5.)

It is not disputed that the Commission's order would have been within the scope of remedial powers available to the Commission had the Commission filed a §12(b) complaint and persuaded a majority of the tribunal members that the evidence supported the complaint. Nothing in the opinions of the circuit court or the Court of Appeals suggests that the Commission lacks the statutory authority to pass an order similar to the one passed in the instant case. The lowers courts have simply made it clear that the Commission is bound by the procedural requirements of the statute governing its operation.

It should be noted that proceedings under the Maryland Act are substantially different from proceedings under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, as amended ("Title VII"). Both Title VII and the Maryland Act start with a complaint, proceed through investigation, and attempt to reach agreement, through conciliation; however, at this point, the similarity ceases. Under Title VII, if an agreement is not reached by conciliation, the next step is the filing of a suit in the appropriate federal court, since there is no provision for a hearing before the EEOC; under the

Maryland Act, the next step after failure of agreement is a public hearing before the Commission. The suit filed in the federal court under Title VII proceeds as any other suit under the Federal Rules of Civil Procedure providing for pleading, discovery, limiting of the issues, pretrial conferences, etc.; a public hearing before the Commission under the Maryland Act proceeds without such pleadings, discovery and definition of issues.

Because of this fundamental difference between Title VII and the Maryland Act, the cases cited by the Commission on the subject of an expansive interpretation of the complaint under Title VII are inapplicable to proceedings before the Commission under the Maryland Act. The federal cases deal with the question of how far the suit filed in the federal court may go beyond the charge initially made at the start of the EEOC investigation. The present case involves no such question since the Maryland procedure is quite different from the procedure under Title VII.

It is clear from reading §12(b) of the Maryland Act that the legislature intended to provide respondents with certain safeguards within the Commission's procedures if charges are made relating to company-wide practices. The need for such safeguards is clear. Unlike the situation where a single individual complaint is involved, a respondent confronted with a §12(b) complaint may have to defend, at public hearing, employment or hiring practices which may affect many or all employees. In addition, of course, any remedial action which the Commission may order could extend into many areas of the respondent's employment practices. The safeguards of §12(b) insure that before a respondent is put to the substantial expense of a public hearing to defend its employment practices, and is exposed to the possibility of sweeping Commission ordered changes in its employment practices, there has been approval of the complaint by at least four

commissioners. While this procedure offers no guarantee that baseless complaints will not be served on employers, it does provide reasonable means by which the sufficiency of a company-wide complaint can be considered before service on an employer. In essence, the legislature has determined that the greater scope of the investigation permitted by a complaint and the greater the scope of an order responding thereto, the greater the need for insuring that the complaint be well grounded before a public hearing is ordered.

In summary, the language of the Act relating to complaints is clear and unambiguous. The Act sets forth the specific way in which an individual complaint under §12(a) may be expanded or amended; further, §12(b) provides for a company-wide complaint. With the language of the Act so clear regarding the matter of complaints, that language controls. There is no need for an examination of the history of the Civil Rights Act or other extraneous matters. *Bouse v. Hutzler*, 180 Md. 682, 26 A.2d 767 (1942); *Rogan v. Baltimore & Ohio Railroad Company*, 188 Md. 44, 52 A.2d 261 (1947). In essence, the Commission is attempting to nullify the provisions of the Act which serve to give an employer fair notice of the complaint to which an answer must be made and a defense presented. This, the Court of Appeals held, the Commission may not do. *Rogan v. Baltimore & Ohio Railroad Company, supra; County Treasurer v. State Tax Commission*, 219 Md. 652, 150 A.2d 452 (1959).

It is well settled that this Court will not review state judgments which rest on independent and adequate state grounds, even if federal grounds are also present. *Fay v. Noia*, 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963); *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958); *Fox Film Corporation v. Muller*, 296 U.S. 207, 80 L. Ed. 158, 56 S. Ct. 183 (1935). It is also well settled that this

policy applies where the independent and adequate state grounds are procedural rather than substantive. *Fay v. Noia, supra; Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408, 85 S. Ct. 564, reh. den. 380 U.S. 926, 13 L. Ed. 2d 813, 85 S. Ct. 878 (1965).

The Petition argues that the Court of Appeals has created a "strict notice standard" and that it has "inconsistently applied its own administrative notice standard to the Commission and, in effect, fashioned a novel and unfair procedural requirement for this case." (Petition, p. 4.) This argument contains an implicit, unsupported assertion that this Court may properly review the judgment of the highest court of a state with respect to that court's view of the state law regarding the adequacy of notice in a state administrative proceedings. More importantly, it is unclear how a state court holding that a state agency must comply with the state *statutory* provisions regarding the giving of adequate notice is either novel or unfair.

Significantly, the Petition in no way indicates how requiring the Commission to utilize the §12(b) complaint would interfere with the enforcement of the Act or how the realization of the objectives of the Act (and Title VII) would be frustrated by the use of a §12(b) complaint. Indirectly, the Petition argues that, if the judgment of the Court of Appeals is left undisturbed, "each member of the class discriminated against [would have] to individually seek relief. Such a result would substantially increase the case load of both federal and state courts." (Petition, pp. 21-22.) The §12(b) complaint eliminates the need for numerous individual actions, thus preventing the feared backlog. A §12(b) complaint permits the Commission to vindicate in one proceeding, the rights of all aggrieved persons employed by one employer.

CONCLUSION

In a very recent case involving the same question of the scope of an order issued by a state "civil rights" agency in response to a single complaint, this Court declined to review a state court judgment that the scope of the complaint limits the scope of any order which may result therefrom. *Connecticut Commission on Human Rights and Opportunities v. Veeder-Root Company, A Division of Veeder Industries,* ... Conn. ....., ... A.2d ....., 6 EPD §8958 (1973), United States Supreme Court, October Term, 1973, No. 73-703, *cert. den.* February 19, 1974, ..., ... L.W. .....

This Court lacks jurisdiction to review by Writ of Certiorari the judgment entered by the Court of Appeals of Maryland because the Commission was not a party below, thereby precluding it from seeking review of the judgment below, and because the judgment below was based on adequate and independent state grounds. Therefore, UPS submits that the petition should be denied.

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APPENDIX A

Excerpts from Article 49B, Md. Code Ann.

* * * * * *

§ 14. Hearing.

* * * * * *

(c) *Amendment of complaint or answer; testimony to be under oath and recorded.* — The Commission may permit reasonable amendment to be made to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

APPENDIX B

SENATE OF MARYLAND

No. 549

By: Senator Curran (Departmental)

Introduced and read first time: February 8, 1974.

Assigned to: Judicial Proceedings

A BILL ENTITLED

AN ACT concerning

Human Relations Commission — Enforcement and Judicial Review

FOR the purpose of establishing certain limitations upon the applicability of the judicial review standards of the Administrative Procedure Act to orders of the Human Relations Commission; granting the Commission the status of an interested party in matters relating to the review of its orders; and generally relating to the enforcement and judicial review of orders of the Human Relations Commission.

BY repealing and re-enacting, with amendments,
Article 49B — Human Relations Commission
Section 15
Annotated Code of Maryland
(1972 Replacement Volume and 1973 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That Section 15 of Article 49B — Human Relations Commission, of the Annotated Code of Maryland (1972 Replacement Volume and 1973 Supplement) be and it is hereby repealed and re-enacted, with amendments, to read as follows:

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW. [Brackets] indicate matter deleted from existing law.

Article 49B — Human Relations Commission

15.

* * * * * *

(B) ANY PARTY AGGRIEVED BY A FINAL ORDER OF THE COMMISSION, EXCEPT AN ORDER ENTERED BY THE COMMISSION PURSUANT TO § 13(C) ABOVE, MAY SEEK JUDICIAL REVIEW THEREOF PURSUANT TO THE APPROPRIATE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT. IF A RESPONDENT IS THE AGGRIEVED PARTY SEEKING THIS JUDICIAL REVIEW, THEN THE COMMISSION SHALL HAVE THE STATUS OF AN INTERESTED PARTY IN ALL MATTERS, INCLUDING APPEALS, AND MAY PARTICIPATE, REPRESENTED BY ITS GENERAL COUNSEL, IN ALL LITIGATION ARISING THEREUNDER. IF AN AGGRIEVED PARTY FAILS TO SEEK JUDICIAL REVIEW WITHIN THE TIME PRESCRIBED BY APPLICABLE STATUTE OR RULE OF PROCEDURE, THE STANDARDS OF JUDICIAL REVIEW AVAILABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT WILL NOT APPLY TO ANY ENFORCEMENT ACTION INSTITUTED BY THE COMMISSION PURSUANT TO SUBSECTION (A) HEREOF.

* * * * * *

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1974

APPENDIX C

Excerpt from Title 28, U.S.C. § 1257.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follow:

* * * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitutions, treaties or statutes of, or commission held or authority exercised under, the United States:

* * * * * *